ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	MB Docket No. 11-54
Amendment of Section 73.622;	)	RM - 11624
Table of Allotments;	)	
Digital Television Broadcast Stations.	)	
(Augusta, Georgia)	)	

FILED/ACCEPTED

MAY - 4 2011

Federal Communications Commission
Office of the Secretary

JOINT COMMENTS IN OPPOSITION

Cavalier Wireless, LLC ("Cavalier") and Continuum 700 LLC ("Continuum"), by counsel and pursuant to Section 1.420 of the Commission's rules, hereby summit their Joint Comments in Opposition ("Joint Comments") to the captioned Petition for Rulemaking ("Petition"), filed by Southeastern Media Holdings, Inc. ("Petition"). In support hereof, the following is respectfully shown.

I. STANDING

Each of Cavalier and Continuum is an FCC licensee of 700 MHz A Block spectrum in one or more license areas located in proximity to the subject application.[1] Pursuant to Section 27.60 of the Commission's rules, were the subject Petition to be granted, each of Cavalier and Continuum would (a) have to protect the Petitioner from interference from its wireless operations and (b) acceptance interference to its wireless operations from the Petitioner. In view of this, it is clear that each of Cavalier and Continuum is a party in interest and has in this proceeding.[2]

[1] Cavalier is licensed over Station WQIZ398, in BEA0027A, in the Augusta, GA-Aiken, SC BEA; and Continuum is licensed for StationWQLA796 in BEA0028A, in the Savannah, GA-SC BEA and Station WQLA797, in BEA0029A, in the Jacksonville, FL-GA BEA.
[2] Sanders Brothers Radio Station, 309 US 470 (1940).

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II. BACKGROUND

The subject Petition requests substitution of DTV Channel 31 for DTV Channel 51 at Augusta, Georgia. Petitioner states that it was previously allotted DTV Channel 51, Petition, at 1, and constructed a station on that channel. Id. Subsequently, Petitioner realized that it had somehow built facilities different than those authorized by its construction permit. Id. Then it applied for a modification of authorization to bring the facilities, as constructed, into harmony with what was authorized. That application was granted.[3]

After all of that, Petitioner realized it could have superior coverage over DTV Channel 31, as compared with DTV Channel 51. So, on June 20, 2008 Petitioner filed for authority to move from DTV Channel 51 to DTV Channel 31. That petition for rulemaking, and subsequent modification application, was granted on March 11, 2009.[4]

After the Commission granted Petitioner what it requested, Petitioner decided that implementation of the plan that it had proposed would be financially difficult. Petition, at 2. No doubt guided by that leaning, Petitioner did an about-face and decided that now it "is satisfied" with service over Channel 51. Id.

Insofar as the public interest justification is concerned, there is no showing that grant of the Petition would lead to improved, or even equal, service availability. Rather, the sole justification for the Petition appears to be financial issues involving Petitioner.

[3] See File No. BMPCDT-20080219ATL.
[4] File No. BMPCDT-20090303ABA.

III. DISCUSSION

A. Channel 51 Should Never Be Allotted When Other DTV channels are Available

As discussed above, Channel 51 is on the DTV/Wireless spectrum border. As such, and at an absolute minimum, it should never be added to the table of allotments when other DTV channels are available. To do so would be to disserve the public interest by needlessly introducing added interference considerations into the existing spectrum equation, thereby adding to the coordination obligations of adjacent channel carriers.

Here, no question exists regarding the availability of alternative DTV channels; no public interest benefit would result from the relief Petitioner seeks; and the Petition should therefore be denied for these reasons alone.

B. Given the Pendency of Another Rulemaking Proceeding Directly on Point, There is No Reason to Rule on the Instant Petition.

Unrecognized in Petitioner's submission is one vital fact: On March 15, 2011, two parties filed a petition for rulemaking (the "Channel 51 Petition") by which they demonstrated, inter alia, that no changes to the allotment table, and no new licensing, should be permitted regarding DTV Channel 51. Among other things, the petitioners there demonstrated that to do otherwise would likely frustrate core goals of the Commission's National Broadband Plan. *Channel 51 Petition, at 4.* More recently, the Commission has received considerable comments supporting that petition.[5]

The public interest would be served only by holding in abeyance the instant Petition until the Commission can appropriately consider the broader Channel 51 rulemaking petition now

[5] See public record in RM 11626.

before it. To do otherwise would constitute pre-judging of the Channel 51 Petition, and possibly result in the Commission rendering conflicting decisions in related proceedings.

C. Regulatory Clarity Demands Denial of the Instant Petition.

As the D.C. Circuit properly observed more than two decades ago: "orderliness and predictability [which] are the hallmarks of lawful administrative action". *Reuters Limited v FCC, 781 F.2d 946 (D.C. Cir. 1986).* Whereas that comment was directed more to the Federal Communications Commission than to the parties that it regulates, Petitioner is here arguing that neither it nor the Commission need to act in a manner that is orderly or predictable with respect to DTV Channel 51 allocation and operation. That contravenes the *Reuters* ruling. As Petitioner itself concedes: First, it wanted Channel 51; after it got that for which it asked, it built facilities that were at odds with its authority; then it changed its mind again; now it wants Channel 51, again. It is impossible to really know what it will want tomorrow, but its sequential requests are most certainly neither "orderly" nor "predictable."

Petitioner is entitled to change its mind, and even to change it time and again, as it has here. Yet, the Commission is not obligated to change course any time that Petitioner, at a whim, wants something different. To do so would be to frustrate the planning and operation of adjacent channel licensees. This is especially the case where, as is here the case, the basis for the change is convenience, not need.

IV. GRANT OF THE PETITION WOULD BE INCONSISTENT WITH THE GOALS OF THE NATIONAL BRADBAND PLAN

Were the Commission to grant the Petition, it would send precisely be the wrong message to both the wireless and the broadcast industry. To wireless carriers, the message would be "if you attempt to settle with existing Channel 51 licensees, to resolve possible interference, be on notice that the settlement could well be to no avail, as a new DTV licensee could arrive on the

scene and nullify any benefits from the settlement". Under that scenario, wireless carriers would be far less willing to settle, and it would thus be far less likely that broadband would be available over their spectrum.

Broadcasters would hear that there is an opportunity to exact settlement from wireless carriers, simply by becoming authorized over DTV Channel 51, and understand that the proceeds from any such settlement could be applied as they deem appropriate, either to engage in more legitimate endeavors, or otherwise. While most broadcasters would likely not sink to the depths of taking advantage of the situation, no public interest benefit would be served by tempting good licensees to do not-so-good things.

V. CONCLUSION

For all of the above reasons, the Commission should deny the instant Petition. If it elects not to do so, it should hold it in abeyance until it rules in RM - 11626.

Respectfully submitted,

CAVALIER WIRELESS, LLC
CONTINUUM 700 LLC

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May 4, 2011

CERTIFICATE OF SERVICE

I, Gary L. Smith, a legal assistant of the law firm Lukas, Nace, Gutierrez & Sachs, LLP, hereby certify that on this 4th day of May, 2011, copies of the foregoing JOINT COMMENTS IN OPPOSITION were sent via electronic mail to the following:

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